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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Respondent,

9 v.

10 MICHAEL ANTHONY CERNAK,

11 Defendant.

Case No. 2:03-cr-00534-KJD  
2:17-cv-00762-KJD

ORDER

12 Presently before the Court is Petitioner Michael Anthony Cernak's ("Petitioner") Motion  
13 to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("2255 Motion")  
14 (#139/164). The Government filed responses and supplements in opposition (#141/165) to which  
15 Petitioner replied (#143).

16 I. BACKGROUND

17 On September 18, 2006, Petitioner pleaded guilty to six counts of armed bank robbery  
18 and one count of possession of a firearm during and in relation to a crime of violence. On  
19 December 11, 2006 the Court entered Judgment against Defendant on those counts. The Court  
20 sentenced Petitioner to two hundred four (204) months imprisonment on the six armed bank  
21 robbery counts to be followed by a consecutive eighty-four month (84) term on the possession of  
22 a firearm during a crime of violence count.

23 On March 16, 2017, Petitioner filed the present 2255 motion, arguing that his sentence  
24 violates due process because it is based on an unconstitutionally vague portion of 18 U.S.C. §  
25 924(c). Petitioner's vagueness argument relies on Johnson v. United States, 135 S. Ct. 2551  
26 (2015). In Johnson, the U.S. Supreme Court ruled that the residual clause of the Armed Career  
27 Criminal Act (ACCA) is unconstitutionally vague. Johnson, 135 S. Ct. at 2557. Petitioner  
28 accordingly points to language in § 924(c)'s residual clause, which is identical to that of the

1 ACCA's residual clause, for the proposition that both provisions, and any convictions and  
2 sentences arising therefrom, are invalid.

3 After the ruling in Johnson, the Ninth Circuit issued its decision in United States v.  
4 Blackstone, 903 F.3d 1020, 1028–29 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762 (2019). As  
5 pertinent to this case, the Ninth Circuit held that Johnson had not been extended to sentences  
6 imposed pursuant to § 924(c). Id. at 1028. Consequently, a 2255 motion seeking to invalidate a §  
7 924 conviction based on Johnson, would therefore be untimely. Id. at 1028, 1029 (“The Supreme  
8 Court may hold in the future that Johnson extends to sentences imposed ... pursuant to [§ 924(c)],  
9 but until then [the petitioner's] motion is untimely.”). However, the Ninth Circuit Court of  
10 Appeals granted Petitioner leave to file this successive 2255 motion and the United States no  
11 longer opposes it on timeliness grounds.

## 12 II. Legal Standard

13 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the Court which  
14 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a  
15 motion may be brought on the following grounds: “(1) the sentence was imposed in violation of  
16 the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the  
17 sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence  
18 is otherwise subject to collateral attack.” Id.; see United States v. Berry, 624 F.3d 1031, 1038  
19 (9th Cir. 2010). When a petitioner seeks relief pursuant to a right newly recognized by a decision  
20 of the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C. §  
21 2255(f)(3). That one-year limitation begins to run from “the date on which the right asserted was  
22 initially recognized by the Supreme Court.” Id. § 2255(f)(3).

## 23 IV. Analysis

24 Petitioner argues that his sentence for Possession of a Firearm in Furtherance of a Crime  
25 of Violence arose under an unconstitutionally vague provision of 18 U.S.C. § 924(c). Title 18  
26 United States Code Section 924(c) criminalizes the use or carrying of a firearm in relation to a  
27 “crime of violence,” and it imposes mandatory minimum sentences that must run consecutive to  
28 any other sentence. An offense may qualify as a crime of violence under § 924(c) through either

1 of two clauses: § 924(c)(3)(A) or § 924(c)(3)(B). Section 924(c)(3)(A), also known as the  
2 statute's "force clause," applies if an individual is convicted of a predicate crime that "has as an  
3 element the use, attempted use, or threatened use of physical force against the person or property  
4 of another." By contrast, § 924(c)(3)(B), known as the "residual clause" of the statute, is much  
5 broader; it applies if the individual is convicted of any predicate felony offense "that by its  
6 nature, involves a substantial risk that physical force against the person or property of another  
7 may be used in the course of committing the offense." The U.S. Supreme Court recently  
8 invalidated § 924(c)(3)(B) after holding that its language is unconstitutionally vague. See United  
9 States v. Davis, 139 S. Ct. 2319, 2335–36 (2019). However, the force clause, § 924(c)(3)(A), has  
10 not been deemed unconstitutional.

11 Here, Petitioner argues that his sentence based on Possession of a Firearm in Furtherance  
12 of a Crime of Violence violates due process because the Court imposed it under the  
13 unconstitutionally vague residual clause, 18 U.S.C. § 924(c)(3)(B). To make that argument,  
14 Petitioner points to his predicate offense of Armed Bank Robbery in violation of 18 U.S.C. §  
15 2113. He claims that Armed Bank Robbery is not a crime of violence by its elements, and thus  
16 his sentence enhancement for that predicate crime under Section 924(c) must have arisen from  
17 the unconstitutional residual clause. The Ninth Circuit in United States v. Watson, 881 F.3d 782  
18 (9th Cir.), cert. denied, 139 S. Ct. 203 (2018), rejected the same arguments made by Petitioner  
19 when it held that federal armed bank robbery constitutes a crime of violence by its elements. 881  
20 F.3d at 786. Petitioner's conviction for Armed Bank Robbery therefore implicates the force  
21 clause, 18 U.S.C. § 924(c)(3)(A), not the unconstitutional residual clause—rendering Petitioner  
22 ineligible for relief on the grounds argued in his 2255 Motion. Accordingly, the Court denies  
23 Petitioner's § 2255 motions.

24 Additionally, the Court will not issue a certificate of appealability, which is required for  
25 Petitioner to proceed with an appeal of this Order. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22;  
26 9th Cir. R. 22-1; Allen v. Ornoski, 435 F.3d 946, 950–51 (9th Cir. 2006); see also United States  
27 v. Mikels, 236 F.3d 550, 551–52 (9th Cir. 2001). This means that Petitioner must make "a  
28 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Slack v.

1 McDaniel, 529 U.S. 473, 483–84 (2000). He bears the burden of demonstrating that the issues  
2 are debatable among jurists of reason; that a court could resolve the issues differently; or that the  
3 questions are adequate to deserve encouragement to proceed further. Slack, 529 U.S. at 483–84.  
4 The Court has considered the issues raised by Petitioner with respect to whether they satisfy the  
5 standard for issuance of a certificate of appealability, and determines that the issues do not meet  
6 that standard. The Court therefore denies Petitioner a certificate of appealability.

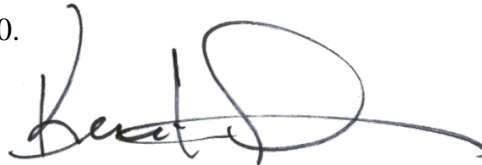
7 V. Conclusion

8 Accordingly, IT IS HEREBY ORDERED that Petitioner Michael Anthony Cernak's  
9 Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#139/164) is  
10 **DENIED**;

11 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for  
12 Respondent and against Petitioner in the corresponding civil action, 2:17-cv-0762-KJD, and  
13 close that case;

14 IT IS FURTHER ORDERED that Petitioner is **DENIED** a Certificate of Appealability.

15 DATED this 31st day of March 2020.

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18 Kent J. Dawson  
19 United States District Judge  
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